IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DAYAL PARDASANI,

Plaintiff,

v. No. 1:02-CV-00247

MARTIN MARIETTA MATERIALS, INC., *et al.*,

Defendants

RECOMMENDATION AND ORDER OF UNITED STATES MAGISTRATE JUDGE

Before this court is Plaintiff Pardasani's Motion to Compel Discovery (docket no. 27) and Defendant Martin Marietta Materials Inc.'s Motion for Summary Judgment (docket no. 30). Plaintiff's motion to compel was not accompanied by a brief. Defendant has responded in opposition (docket no. 29) to Plaintiff's motion to compel. Plaintiff has responded (docket no. 34) to Defendant's motion for summary judgment , and Defendant has replied. The matters are ripe for disposition.

I. Background

Plaintiff filed the present race, age, and national origin discrimination claim against Defendant Martin Marietta Materials Inc., (Martin Marietta), his former employer, and Paige Corkhill, his former supervisor, on April 1, 2002. Defendant Corkhill was dismissed as a party by Order dated February 7, 2003. Discovery was conducted by both parties and ended on September 30, 2003.

Plaintiff filed his motion to compel discovery on September 29, 2003. He requested the court to enter an order compelling Defendant to fully respond to interrogatories 3 through 6, and 7 though 16. He indicated that the information requested was to date from January 1, 1997, through the present. He also complained that Defendant has inappropriately objected or not responded to his discovery requests. In addition to requests for response to specific interrogatories, Plaintiff has moved for an order compelling Defendant to produce documents according to Plaintiff's document requests 1, 2, 6, and 7. As noted, Plaintiff did not file an accompanying brief.

In response to Plaintiff's motion, Defendant argues that Plaintiff has failed to follow LR 26.1(c), requiring Certification of Counsel, and that Plaintiff's motion may be summarily decided according to LR 7.3(k) for failure to file an accompanying brief. Defendant also includes merits arguments in opposition to each request.

Defendant filed its summary judgment motion and accompanying brief on October 27, 2003. As required by LR 56.1(b), Defendant's motion was filed within thirty days after the end of the discovery period. Defendant argues that there are no material facts in dispute (p. 8, docket no. 31); that the Plaintiff, as a matter of law, cannot establish a *prima facie* case under either Title VII or The Age Discrimination in Employment Act (*id.*); that Plaintiff was terminated for legitimate, non-discriminatory reasons (*id.* p. 12); and that there is no evidence that can show that

the Defendant's legitimate, non-discriminatory reason for terminating Plaintiff is pre-textual (*id.* p. 15).

For the reasons stated below, this court will summarily deny Plaintiff's motion to compel, and will recommend that Defendant's motion for summary judgment be granted.

II. Facts

Plaintiff's claims arise from events that occurred while he was employed at Martin Marietta, and resulted in his termination. Plaintiff was hired by Defendant in the summer of 1997 to work as a programmer analyst in the programming section of Defendant's Information Services Department. *See* Corkhill Aff., paragraph 3 and Ex. A, in Appendix (docket no. 32). He was both hired and fired by Paige Corkhill.

By July of 1999, Plaintiff's annual performance reviews were noting deficiencies in his work, (Corkhill Aff., paragraph 6; Pardasani Depo., pp. 87-88, in Appendix) and constructive guidance as to each of his deficiencies (*see* Corkhill Aff., Ex. C, in Appendix). In January of 2000, before the 2000 performance review was to take place, Paige Corkhill, who had been responsible for hiring Plaintiff, became his direct supervisor. See Pardasani Depo., p. 62, in Appendix. Upon becoming his supervisor, Corkhill met with Plaintiff to discuss continuing performance deficiencies and to develop and implement a plan for meeting performance expectations.

As a part of this plan, Plaintiff was enrolled in an English course so that he might improve his written and verbal communication skills. Martin Marietta paid for Plaintiff to attend a two day program in New York City entitled "When English Is A Second Language." *See* Pardasani Depo., pp. 99-101, in Appendix; Corkhill Aff., paragraphs 9-10, in Appendix. Another part of the plan required Plaintiff to meet weekly with Ms. Corkhill. Although Plaintiff requested that these meetings end (*see* Pardasani Depo., p. 92, in Appendi), Ms. Corkhill insisted that they continue in an effort to help Plaintiff maintain his employment (*see* Corkhill Aff., paragraph 12, in Appendix).

In the August 2000 performance review, Corkhill found Plaintiff to have an "unsatisfactory" performance record and defined several immediate changes that needed to be made. *See* Corkhill Aff., paragraph 13 and Ex. D, in Appendix. Despite almost daily meetings with Ms. Corkhill, Plaintiff did not improve. Ms. Corkhill, having hired Plaintiff and having worked with him to improve his performance record, made the decision to terminate Plaintiff when his problems persisted into September of that year. *See* Corkhill Aff., paragraphs 18-19, in Appendix.

III. Discussion

Motion to Compel

Plaintiff filed his motion to compel without filing the LR 26.1(c) Certification of Counsel. The rule provides that "[t]he court will not consider motions and objections

relating to discovery unless moving counsel files a certificate that after personal consultation and diligent attempts to resolve differences the parties are unable to reach an accord." *See also MCI Construction, LLC. v. Hazen and Sawyer, P.C.*, 211 F.R.D. 290 (M.D.N.C. 2002) (finding that "the motion to compel should be denied because the parties failed to conduct a conference as required by Local Rule 26.1(c)"). Nevertheless, the court first considers Plaintiff's *pro se* status and his failure to file a brief with his motion to compel.

This court notes that Plaintiff is proceeding *pro se*, and that Plaintiff did participate in the LR 26.1(c) conference initiated by Defendant upon Defendant's own earlier motion to compel. Thus, Plaintiff's participation in the earlier LR 26.1(c) conference initiated by the Defendant should have alerted him to his own responsibility to initiate the same regarding his own discovery concerns. Plaintiff is not new to the federal court, *see* Def's Mem. Resp. p. 3 n. 1 (noting Plaintiff's previous federal actions)(docket no. 29); *and see Pardasani v. Rack Room Shoes Inc.*, 912 F. Supp. 187 (M.D.N.C. 187), and this court met with him (and Defendants) at the initial pre-trial conference and provided him with a road map of the course of action that he was required to follow. The local rules do not exempt *pro se* plaintiffs from filing the required certification of consultation.

Plaintiff also failed to file an accompanying brief with his motion to compel. Again, this court's LR 7.3(a) requires that "all motions, unless made during a hearing or at trial" (which this one is not) "shall be in writing and shall be accompanied by a

brief . . . ." Significantly, LR 7.3(k) provides that such a motion, unaccompanied by the requisite brief, "may, in the discretion of the court, be summarily denied." There have been no representations by Plaintiff regarding his failure to file the required brief, and this court is unwilling to proceed in this game where Plaintiff's arguments must be guessed.

In an earlier recommendation addressing Defendant's motion to dismiss for lack of proper service, (*see* Recommendation, (docket no. 10)) this court has already treated Plaintiff gingerly because of his *pro se* status, taking seriously the call for courts to avoid applying harsh procedural rules in *pro se* cases. *Wright v. N.C. State Univ.* No. 5:98-CV-644BR3, 1998 WL 937273 (E.D.N.C. Nov. 18, 1998). This cautious treatment has reached its limit, however. Informed by Plaintiff's failure to file the LR 26.1(c) certification of consultation and the required LR 7.3(a) supporting brief, this court will summarily deny Plaintiff's motion to compel.

Motion for Summary Judgment

Summary Judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Zahodnick v. International Bus. Machs. Corp.*, 135 F.3d 911, 913 (4th Cir. 1997). The party seeking summary judgment bears the burden of initially demonstrating the absence of a genuine issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). This burden can be met either by presenting affirmative evidence or by demonstrating that the non-moving party's evidence is

insufficient to establish his claim. *Celotex Corp.*, 477 U.S. at 331 (Brennan, J., dissenting).

Upon a demonstration by the moving party that there is no issue of material fact, the non-moving party may affirmatively demonstrate that there is, truly, a genuine issue of material fact that requires a trial. *Matsushita Elec. Indus. Col. Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In order to secure a trial, the non-moving party must demonstrate sufficient evidence in his favor such that a fact-finder could return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Generally, when making the summary judgment determination, the court must view the evidence and all justifiable inference from that evidence in the light most favorable to the non-moving party. *Zahodnick*, 135 F.3d at 913; *Halperin* v. *Abacus Tech. Corp.*, 128 F.3d 191, 196 (4th Cir. 1997).

The court notes that Plaintiff makes his claim only under Title VII of the Civil Rights Act of 1964, (Pub. L. No. 88-532 § 701, 78 Stat. 253 (1964), codified as amended at 42 U.S.C. § 2000e et. seq.) ("Title VII") (*see* Comp., paragraphs 27-29), but that, as Defendant Corkhill pointed out (*see* Corkhill's Memorandum of Law in Support of Motion to Dismiss, n. 1 (docket no. 4)), a claim of age discrimination is clearly covered by the Age Discrimination in Employment Act of 1967(ADEA). This court also finds, upon examining the record, that there is no direct evidence of discrimination in this case. Therefore, plaintiff's claims under both Title VII and the ADEA are analyzed under the *McDonnell Douglas* burden shifting framework. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142 (2000) (assuming that the

McDonnell Douglas framework used in Title VII cases also applies in ADEA cases); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

To establish a *prima facie* case of discrimination under the *McDonnell Douglas* framework, a plaintiff must show by a preponderance of the evidence that: (1) he was within the protected class; (2) he suffered an adverse employment action; (3) at the time of the adverse employment action, he was performing at a level that met the defendant's legitimate job expectations, and (4) the position he had occupied was filled by a similarly qualified applicant outside the protected class or by a substantially younger worker, establishing an inference of discrimination. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996); *Dugan v. Albemarle County Sch. Bd.*, 293 F.3d 716, 721 (4th Cir. 2002); *Brinkley v. Harbour Rec. Club*, 180 F.3d 598, 607 (4th Cir. 1999), *abrog'n on other grounds recog'd*, *Hill v. Lockheed Martin Logistics Mgmt.,* No. 01-1359, 2004 WL 25018 (4th Cir. Jan. 5, 2004).

Once a plaintiff offers sufficient evidence to establish a *prima facie* case, then the burden shifts to the defendant to demonstrate a legitimate, non-discriminatory reason for the challenged action. *O'Connor* 517 U.S. at 311-12. This burden is "one of production, not persuasion." *Id.* Upon a demonstration of a legitimate, non-discriminatory reason for the challenged action, the presumption of unlawful discrimination "drops out of the picture," and the burden shifts back to the employee to show that the given reason was merely a pretext for discrimination - the more likely reason for his dismissal. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511

(1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). *See also Hawkins v. PepsiCo., Inc.*, 203 F.3d 274, 278-79 (4th Cir. 2000). The responsibility of proving that "the protected trait . . .actually motivated the employer's decision" remains with the plaintiff at all times. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

Even though the *McDonnell Douglas* evidentiary scheme involves shifting burdens, discrimination cases considered under this scheme may nevertheless be evaluated under established summary judgment principles. *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310 (4th Cir. 1993). In order to overcome a motion for summary judgment in a discrimination case, a plaintiff must provide direct or circumstantial evidence "of sufficient probative force" to demonstrate a genuine issue of material fact as to whether the adverse employment decision was based on discriminatory grounds. *Goldberg v. B. Green and Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1998). A plaintiff can fail to meet his burden by failing to establish a *prima facie* case, or by failing to show a genuine factual dispute over the employer's legitimate, non-discriminatory explanation. *Mitchell*, 12 F.3d at 1315.

In this case, Defendant has moved for summary judgment on the grounds that Plaintiff has neither presented sufficient evidence to establish a prima facie case of discrimination based on race, national origin, or age (Mem. Law pp. 8-12 (docket no. 31)), nor presented evidence to show that Defendant's legitimate, non-discriminatory reasons for firing Plaintiff were pre-textual (*id.* pp. 15-16). This court's independent

review leads to the same conclusion; therefore, I will recommend that the motion for summary judgment be granted.

Here, Plaintiff has shown that he was in a protected group, i.e., he is of Indian national origin and of the Asian race, and that he was 60 years old in 2000, the year of the alleged discrimination. *See* Appendix, Defendant's Ex. 13 (docket no. 32). Furthermore, the court acknowledges that his firing constitutes a tangible adverse employment action within the meaning of the anti-discrimination statutes. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."). Plaintiff has not shown, however, that he was performing at a level that met Defendant's legitimate job expectations, or that the position he had occupied was filled by a similarly qualified applicant outside the protected class or by a substantially younger worker. In short, he has not established an inference of discrimination. Plaintiff has not made out a prima facie case of discrimination based on his firing.

Nevertheless, even if further assessment were required, Plaintiff's inability to demonstrate that he was performing at a level that met Defendant's legitimate job expectations is closely tied to Defendant's defense of a legitimate, non-discriminatory reason for the firing of Plaintiff. As demonstrated in the statement of facts above, Plaintiff's evaluations consistently demonstrated short-fallings which Defendant never felt were adequately addressed. Although Plaintiff has attempted

to demonstrate that he was performing adequately, his showing consists wholly of his own opinions of his work performance, and the Fourth Circuit has held that "[i]t is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *Evans v. Technologies Applications and Serv. Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996). Plaintiff has, therefore, not produced any evidence to show that the reasons for his firing as articulated by Defendant were pre-textual[1]. Summary judgment should be granted in favor of Defendant on Plaintiff's claims under both Title VII and the ADEA.

IV. Conclusion

For the reasons stated herein, it is RECOMMENDED that Defendant's motion for summary judgment (docket no. 30) be GRANTED on all of Plaintiff's claims. Furthermore, it is ORDERED that Plaintiff's motion to compel (docket no. 27) be summarily DENIED.

Wallace W. Dixon
United States Magistrate Judge

January 8, 2004

[1] To the extent that Plaintiff might claim that, sometime in 1999, Corkhill handled his request for funeral leave differently from another employee and that this shows pretext, such a claim is unavailing. Happening "sometime in 1999," this event is simply too remote in time from the ultimate firing decision in September 2000 to be evidence of discrimination. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511-12 (4th Cir. 1994). Similarly, the same is true for any claim that Plaintiff might make about not being given the same training opportunities at some unspecified time which others received. Besides, as Defendant notes, Plaintiff was given ample opportunity to attend software training classes and other technology-specific classes, at company expense, at area colleges and technical institutions. *See* Corkhill Aff. paragraph 11 (noting that Plaintiff never took advantage of this opportunity); *see also* Pardasani depo. pp. 110-11.